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Blurred Lines - Where Copyright Ends and Cultural Appropriation Begins - The Case of Robin Thicke versus Bridgeport Music and the Estate of Marvin Gaye

Toni Lester

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**Blurred Lines—Where Copyright Ends
and Cultural Appropriation Begins—The
Case of Robin Thicke Versus Bridgeport
Music and the Estate of Marvin Gaye**

by TONI LESTER*

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“When is imitation flattery and when it is theft?”

– Carla Kaplan¹

I. Introduction

Imagine it’s the summer of 1974. A group of friends are partying on a city sidewalk in front of an apartment building, dancing to the record, *Anthology* by Marvin Gaye.² The album’s jacket cover, propped up against the phonograph sitting in a nearby window, shows a younger Gaye in a classy black tuxedo, bow tie, and neatly cropped afro. The best he has done to date is on this two record set: The

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1. CARLA KAPLAN, *MISS ANNE IN HARLEM: THE WHITE WOMEN OF THE BLACK RENAISSANCE* (Harper 2013).

2. MARVIN GAYE, *ANTHOLOGY* (Motown Records 1974).

popular love duets with the late Tammi Terrel, the R&B hit, “I Heard It Through the Grapevine,” and the soul civil rights anthem, “What’s Going On.”³ People are laughing loudly and dancing to the music, much like the crowd on the album’s last track. The song on that track—“Gotta Give It Up”⁴—is about a shy man at a party who eventually loosens up and dances the night away.⁵ It is Gaye’s answer to the disco era with a twist; while the song’s overall feel makes it conducive to disco’s lilting dance moves, the funky bass line supported by a catchy eighth note drum motif with a cowbell on the accents for emphasis, and Gaye’s steamy, falsetto vocals make clear that it is firmly rooted in the funk and R&B tradition from which Gaye’s career originally arose. People love the hip and danceable—yet hard to categorize—music, making it one of Gaye’s most popular hits.⁶

Fast forward to 2013. A YouTube video featuring a white male singer supported on backup vocals by two of the leading black hip hop artists of the day goes viral.⁷ The song performed on the video, which is about a man trying to seduce a woman,⁸ is both popular and controversial. Originally, women dancers featured in the video were naked, and that, along with some of the song’s lewd lyrics caused many—including this writer—to consider it misogynistic.⁹ But what is most

3. Rovi Staff, *Review of Anthology—Marvin Gaye*, ALLMUSIC, <http://www.allmusic.com/album/anthology-1974-mw0000837273> (last visited Oct. 1, 2013).

4. Jason Birchmeier, *Review of Marvin Gaye—Live at the London Palladium*, ALLMUSIC, <http://www.allmusic.com/album/live-at-the-london-palladium-mw0000650180> (last visited Oct. 1, 2013).

5. Gotta Give it Up *Lyrics*, LYRICSMODE, www.lyricsmode.com/lyrics/m/marvin_gaye/got_to_give_it_up.html (last visited Oct. 1, 2013) (“I used to go out to parties / And stand around / ‘cause I was too nervous / To really get down / But my body yearned to be free / I got up on the floor and thought / Somebody could choose me . . . I done got myself together baby / And now I’m havin’ a ball”).

6. Ron Wynn, *THE ALL-MUSIC GUIDE TO ROCK* (1995), *available at* <http://www.superseventies.com/spgayemarvin3.html> (last visited Oct. 1, 2013). Ron states:

[This album is] [a]s fine a live album as Marvin Gaye ever made. The final track, the extended version of *Gotta Give It Up*, still gets wide airplay at parties and in clubs. It was among his greatest uptempo hits ever, and the full treatment includes some wonderful instrumental work at the end accompanying Gaye’s floating vocals and fleeing sighs.

Id.

7. ROBIN THICKE, *Blurred Lines* ft. T.I. & Pharell, on *BLURRED LINES* (Interscope 2013).

8. *Id.*

9. In one of the lyrics, the lead male singer invites the imaginary object of the song to have sex with him instead of her current lover: “He don’t smack your ass and pull your hair for you . . .” *Id.* Numerous groups have boycotted the song, including the “lawrevuegirls,” a feminist performance group, whose YouTube-posted parody of the song has garnered it over 2.3 million viewer hits. The parody replaces Thicke’s line

catchy about the video is the funky, floating bass line, the lead singer's falsetto voice, and the overall beat accentuated by a cowbell for effect. The song, written by the main singer in the video and one of the video's black backup singers, rises to the top of the R&B charts, traditionally dominated exclusively by black artists.¹⁰ The song rewards its co-writers with profits from four million copies in sales in the United States, and 138 million viewings on YouTube.¹¹

For Marvin Gaye's surviving family members, there is something deeply familiar about the new video. They feel the new song is really "Gotta Give It Up," the old song, in disguise.¹² Disturbed by what they hear, and more importantly, by the realization that they will not reap the profits from the sales of the new song, they threaten to sue the white singer and his hip hop partners. But in a move that is as artful as it is ruthless, the new song's composers sue the family first.¹³

That is just what happened in the spring of 2013 when singer Robin Thicke and his co-songwriter, hip hop artist Pharrell Williams, filed a claim for declaratory judgment against the estate of Marvin Gaye in the U.S. District Court for the Central District of California. They asked the court to declare that their song "Blurred Lines" did not illegally copy "Gotta Give It Up." They asserted:

The basis of the Gaye defendants' claims is that "Blurred Lines" and "Got To Give It Up" "feel" or "sound" the same. Being reminiscent of a 'sound' is not copyright infringement. The intent in producing "Blurred Lines" was to evoke an era.

"Everybody get up" with "Every bigot shut up!" See The Law Revue Girls, *Robin Thicke—Blurred Lines [Feminist Parody] "Defined Lines,"* available at <http://www.youtube.com/watch?v=tC1XtnLRLPM> (last visited Oct. 1, 2013).

10. Rashad Drakeford, *From Robin Thicke to Mayer Hawthorne: Has R&B Become a White Man's Game?*, THE GRIO (July 31, 2013), available at www.thegrio.com/2013/07/31/from-robin-thicke-to-mayer-hawthorne-has-rb-become-a-white-mans-game (last visited Oct. 1, 2013).

11. Neb Sisario, *Songwriters Sue to Defend a Summer Hit*, N.Y. TIMES (Aug. 16, 2013), available at http://www.nytimes.com/2013/08/17/business/media/songwriters-sue-to-defend-a-summer-hit.html?_r=1&.

12. *Marvin Gaye's Son—You Bet We're Gonna Sue Robin Thicke*, TMZ ON TV (Aug. 22, 2013), available at <http://www.youtube.com/watch?v=Eugx6aZLwuo> (last visited Oct. 1, 2013); see also David Ritz, *Robin Thicke, You're No Marvin Gaye*, ROLLING STONE MAGAZINE (Aug. 23, 2013), <http://www.rollingstone.com/music/news/robin-thicke-youre-no-marvin-gaye-20130823> (Ritz, Gaye's biographer, said: "Thicke and company not only copied Gaye's distinct bass line, but the defining funk of the cowbell accents.").

13. Complaint for Declaratory Relief, *Williams v. Bridgeport Music, Inc.*, No. CV13-06004-JAK-AGR (C.D. Cal. Aug. 15, 2013), ECF No. 1 [hereinafter Complaint].

In reality, the Gaye defendants are claiming ownership of an entire genre, as opposed to a specific work.¹⁴

Public reaction to the case has been mixed. Some feel Thicke and Williams should be applauded for honoring Gaye. As one commentator put it:

I can't even count how many times I've seen . . . Robin Thicke participate in the BET Awards' R&B trailblazer homage performances. They are carrying on the R&B tradition in an authentic way They all have a serious reverence and appreciation for the history of R&B.¹⁵

Others are less forgiving: "There is a difference between being inspired and mimicing,"¹⁶ said one naysayer.

Perhaps the most touching response comes from Gaye's son, Marvin Jr. In a television interview, Marvin Jr. said:

We are all fans of Robin Thicke's There is a way to do business and a way not to do business Suing us . . . has caused me and my family duress If you listen to the music, I am sure anyone will see the similarities clearly [between] what my father does and what Robin Thicke is trying to do.¹⁷

In that same interview, the opening sounds to the Thicke hit, "Million Dollar Baby," and the opening sounds to Gaye Sr.'s song, "Trouble Man," were played in order to compare the songs to each other.¹⁸ As the interviewers, Marvin Jr., and even this writer, agree, to even the completely untrained listener's ears, the former seems to be exactly the same as the latter.¹⁹

14. *Id.* at 2. In the same case, the claimants also sued Bridgeport Music, owner of the song, *Sexy Ways* by the group Funkadelic, asking that the court also declare that *Blurred Lines* did not infringe on *Sexy Ways*. *Id.*

15. Drakeford, *supra* note 10.

16. Daren W. Jackson, Commentary, Andrea K. Castillo's *Robin Thicke's Blurred Lines Legal Drama—Family of Marvin Gaye Not Impressed*, CONCRETE LOOP (Aug. 16, 2013), <http://web.archive.org/web/20130818131239/http://concreteloop.com/2013/08/music-news-robin-thickes-blurred-lines-legal-drama-family-of-marvin-gaye-not-impressed> [hereinafter Castillo].

17. TMZ ON TV, *supra* note 12.

18. *Id.*

19. *Id.*

It should thus be no surprise that just below the surface of this dispute, is another more insidious aspect of the controversy that the law traditionally has been resistant to address. That has to do with the question of cultural appropriation and the extent to which white artists unduly benefit from their exploitation of black music, with black artists on the losing end monetarily over and over again. Pioneering law scholars, such as K.J. Green, have written extensively on the history of the American legal system's use of "copyright and contract law . . . [in order to deprive] black artists, as a class, of credit, compensation and control."²⁰ Greene has said:

Time after time, foundational artists who developed ragtime, blues, and jazz found their copyrights divested, and through inequitable contracts, their earnings pilfered [F]or a long period of U.S. history, the work of black blues artists was essentially dedicated to the public domain . . . [which can] broadly be defined as material that is unprotected by intellectual property rights, either as a whole or in a particular context, and is thus free for all to use.²¹

Were Thicke and Williams perpetuating the dynamic criticized by Greene when they filed their declaratory judgment claim? Or were they legitimately contributing to the evolving genre of R&B and soul music originated by black greats like Gaye and others? This article will answer these questions by first exploring the extent to which the song "Blurred Lines" constitutes illegal copyright infringement of "Gotta Give It Up"²² under the U.S. Copyright Act and traditional judicial interpretations thereof. It will then make some predictions about the outcome of the declaratory judgment claim currently under consideration in California.

20. K.J. Greene, "Copynorms," *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1181 (2008) ("For many generations, black artists as a class were denied the fruits of intellectual property protection—credit, copyright royalties and fair compensation.").

21. K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL'Y & L. 365, 370–71 (2008) (internal quotation marks omitted).

22. Interestingly enough, one of the parties in the *Bridgeport* case, George Clinton of the group Funkadelic, is also a party in the current declaratory judgment case. He, however, has said publicly that he does not believe *Blurred Lines* infringes on his song, *Sexy Ways*. See Castillo, *supra* note 16 (citing Clinton on Twitter: "No sample of #Funkadelic's *Sexy Ways* in @RobinThicke's *Blurred Lines*—yet Armen Boladian thinks so? We support @RobinThicke @Pharrell!").

Lastly, I will formulate own conclusions about whether “Blurred Lines” culturally appropriates “Gotta Give It Up.” My initial reaction is that we should look with heightened scrutiny on anything Thicke does that even slightly resembles Marvin Gaye’s legacy, given what appears to be Thicke’s outright copying of Gaye’s song, “Trouble Man.” However, at least from a traditional legal perspective, while “Blurred Lines” definitely seems to be inspired by “Gotta Give It Up,” it is not an illegal copy of the song because the copied elements constitute the musical equivalent of unprotected “*scènes à faire*”²³ (i.e., generic ideas) under copyright law.

That, however, does not make it “right” in terms of ethics. The law should be a floor, not a ceiling, in terms of motivating people to do right by others, especially in cases where the law has a longstanding history of being used to exploit and disadvantage a particular minority group. Some may argue that this case is different because both a black man and a white man co-wrote the song and still benefit from its sale financially. But taking into account that the lead singer for this song is white, and that that is one of the chief reasons for its monumental success monetarily, it is clear that the dynamic of cultural appropriation is still at play. One music critic put it bluntly:

[T]he difference is that Thicke has done what many black artists right now have not: He has a number-one single on the Billboard Hot 100 . . . for four weeks and counting . . . [which means he] . . . is getting the kind of exposure that other black R&B artists aren’t, an attention magnified by the color of Thicke’s skin.²⁴

II. Copyright Law Applied to “Blurred Lines” and “Gotta Give It Up”

A. The U.S. Copyright Act.

The origins of U.S. copyright law lie in Article I, Section 8 of the U.S. Constitution, which states that Congress has the authority to “promote the progress of science and useful arts, by securing for

23. Whitney D. Brown, McDermott Will & Emery, *Eighth Circuit Finds Summer Camp’s Medieval Theme To Be Scènes à Faire and Non-Infringing*, LEXOLOGY (Sept. 30, 2010), <http://www.lexology.com/library/detail.aspx?g=39dc6160-1ece-4762-b5a1-d5e5f8de1445> (last visited Dec. 1, 2013).

24. Nico Lang, *From Macklemore to Robin Thicke: What Gentrification Means for Hip-Hop*, THOUGHT CATALOG (June 18, 2013), <http://thoughtcatalog.com/2013/from-macklemore-to-robin-thicke-what-gentrification-means-for-hip-hop>.

limited times to authors and inventors the exclusive right to their respective writings and discoveries.”²⁵ Further, Section 102(a) of the U.S. Copyright Act provides that “copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”²⁶ This includes literary works and musical works, along with their lyrics.²⁷ Section 102(b) states that the underlying ideas on which a work is based are not protected.²⁸ Further, while it is not necessary to prove intent in infringement cases, infringers are subjected to higher penalties if their use is willful and intentional.²⁹

The main defense to copyright infringement falls under the “fair use” exception in the Act. Fair use can include criticism and commentary, and should be assessed by looking at the purpose of the use, the nature of the work, the extent to which the use was substantial, and the impact the use has on the market for the infringed work.³⁰

In light of the above, the judge in the Thicke suit will probably address the following issues before making a ruling:

- 1) Whether Thicke and Williams intended to copy Gaye’s song when they wrote “Blurred Lines”;
- 2) Whether the Thicke/Williams song is substantially similar to Gaye’s song. And if it is, whether parts of Gaye’s song that appear in the Thicke/Williams song are protected because they are original; and
- 3) Whether “Blurred Lines” can successfully avail itself of the fair use defense in an infringement case against it.

B. The Intent Requirement in Copyright Law

In the well-known copyright infringement case *Bright Tunes Music v. Harrisongs*,³¹ the District Court for the Southern District of New York grappled with how to determine if intent is present in copyright infringement cases. In that case, Robert Mack’s 1962 song, “He’s So Fine” was a top ten hit in England for seven weeks in 1963,

25. U.S. CONST. art. I, § 8, cl. 8.

26. 17 U.S.C. § 102(a) (2012) (emphasis added).

27. *Id.*

28. *Id.* § 102(b) (emphasis added).

29. 17 U.S.C. § 504.

30. 17 U.S.C. § 107.

31. 420 F. Supp. 177 (S.D.N.Y. 1976).

and a number-one hit on the Billboard charts in the U.S. for five weeks.³² International Beatles icon and British resident, George Harrison, along with musical collaborator Billy Preston, began composing the song, “My Sweet Lord,” several years later in 1970.³³ Comparing the melody in “My Sweet Lord” to the melody in “He’s So Fine,” the court said that “in musical terms the two songs are virtually identical except for one phrase. There is motif A used four times, followed by motif B, used four times in one case and three times in the other, with the same grace note in the second repetition of motif B.”³⁴

Harrison claimed neither he nor Preston were aware that they were copying “He’s So Fine” when they sat down to collaborate on the creation of “My Sweet Lord.”³⁵ The court, however, concluded that Harrison settled on the particular combination of motifs in the A section because he knew on some subconscious level that the motif would work well with listeners because he had heard it before.³⁶ The court implied that Harrison had access to “He’s So Fine” because it was a hit song played on radio stations worldwide by saying, “This is, under the law, infringement . . . no less so even though subconsciously accomplished.”³⁷ Had Harrison and Preston not had access to “He’s So Fine” because it had not become a hit, they might not have been found guilty of infringement. As the judge in another case put it, “a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”³⁸

Applying the above analysis to the Thicke suit, there is no doubt that Thicke and Williams had access to “Gotta Give It Up,” since both are quoted as saying that they are huge fans of Gaye’s music.³⁹

32. *Id.* at 178–79.

33. *Id.* at 178.

34. *Id.*

35. *Id.* at 179 (“It is apparent . . . that neither Harrison nor Preston were conscious of the fact that they were utilizing the *He’s So Fine* theme.”).

36. *Id.* at 181 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) and *N. Music Corp., v. Pacemaker Music Co., Inc.*, 147 U.S.P.Q. 358, 359 (S.D.N.Y. 1965)).

37. *Bright Tunes Music*, 420 F. Supp. 177 at 181.

38. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

39. Emerald Murrow, *Pharrell Talks about Battle with Marvin Gaye Estate Over Megahit Blurred Lines*, WINNEPEG FREE PRESS (Sept. 13, 2013), <http://www.winnipegfreepress.com/wfpfeatured/pharrell-talks-about-battle-with-marvin-gaye-estate-over-megahit-blurred-lines-223583931.html>.

Further, in counterclaims filed in connection with the suit, Gaye's estate points to interviews Thicke gave to *Billboard* and *GQ* magazines in which he allegedly said:

Pharrell and I were in the studio and I told him that one of my favorite songs of all time was Marvin Gaye's "Got to Give it Up." I was like, "Damn, we should make something like that, something with that groove." Then he started playing a little something and we literally wrote the song in about a half hour and recorded it.⁴⁰

If it can be proven in court that Thicke actually said this, then it is clear that he was aware of Gaye's hit before he sat down with Williams to compose their song and intended to imitate it.

C. The Originality and Substantial Similarity Requirements in Copyright Law

1. *The Math—What Is Subtracted and What Is Kept*

I have grouped the concept of originality together with the concept of substantial similarity because both concepts are dependent on each other. Courts are only bound to protect a song's original constituent elements in infringement cases.⁴¹ A judge will first subtract a song's unprotected elements, then look at what's left to determine if that is sufficiently original to warrant legal protection. Lastly, if the alleged infringing work uses a substantial part of this residual portion, a copyright theft determination will occur.

As stated previously, what matters most in copyright law is how ideas are expressed specifically, not the underlying ideas themselves.⁴² In the context of literature, common devices used to create historical fiction—called "*scènes à faire*"—are viewed as if they are generic ideas free for all to use.⁴³ This is "because it is virtually impossible to write about a particular historical era or fictional theme without employing"⁴⁴ these devices. This is also true for "clichéd language,

40. Eriq Gardner, *Marvin Gaye's Family Sues EMI for Blurred Lines*, BILLBOARD (Oct. 30, 2013), <http://www.billboard.com/biz/articles/news/legal-and-management/5770727/marvin-gayes-family-sues-emi-for-blurred-lines>.

41. *Jarvis v. A&M Records*, 827 F. Supp. 282, 291 (D.N.J. 1993) (citing Feist Publ'ns, Inc., 499 U.S. at 350).

42. 17 U.S.C. §§ 102(a), 102(b) (2012).

43. *Hoehling v. Universal City Studios*, 618 F.2d 972, 979 (2d Cir. 1976).

44. *Id.*

phrases and expressions conveying an idea that is typically expressed in a limited number of stereotypic fashions.”⁴⁵

Thus, someone who writes a murder mystery with an eccentric detective who has a doctor as a sidekick, could probably not be sued for illegal copyright infringement based on that plot alone, because it has been used so many times that it is considered to be generic and not unique or original. However, a more detailed story line about the specifics of the murder under investigation (i.e. who was killed, how, when and where) would be a protected expression of the initial idea. The rationale for this unwillingness to protect ideas in and of themselves is that “only by vigorously policing the line between idea and expression can . . . artists receive due reward for the original creations . . . [while] proper latitude is granted to other artists to make use of ideas that properly belong to us all.”⁴⁶

Next I will examine how harmony and rhythm are treated under the law.

2. *How Harmony Is Treated*

Melody is a “rhythmically organized sequence of single tones so related to one another as to make up a particular phrase or idea.”⁴⁷ Harmony occurs when two or more musical pitches sound at the same time.⁴⁸ Harmony is vertical in its relationship to melody, since “it is only achieved when [these pitches or notes] . . . are played at the same time. Melody, on the other hand, is ‘horizontal,’ since its notes are played in succession and read horizontally (for the most part) from left-to-right.”⁴⁹

Some harmonic progressions (sometimes called “chords”) in music are also treated, if not overtly, then by default, like *scènes à faire*. This is especially true in jazz, where it is common for musicians to improvise (or compose new music) over the chord progressions of well-known “standard” songs. A classic case is the harmonic progression for the George Gershwin song, “I Got Rhythm,” also

45. Jarvis, 827 F. Supp. at 291 (1993) (citing *Perma Greetings, Inc. v. Russ Berrie & Co.*, 598 F. Supp. 445, 448 (E.D. Mo. 1984)).

46. Note, *Jazz Has Got Copyright Law and That Ain’t Good*, 118 HARV. L. REV. 1940, 1947 (2005) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][2][a] 13–70 (2004)).

47. Melody Definition, AMERICAN HERITAGE DICTIONARY, <http://www.yourdictionary.com/melody> (last visited Dec. 1, 2013).

48. Harmony Definition, WEBSTER’S NEW DICTIONARY, at <http://www.yourdictionary.com/harmony> (last visited Dec. 1, 2013).

49. Brandy Kramer, *Harmony*, ABOUT PIANO, http://www.piano.about.com/od/musicalterm/sa1/g/GL_harmony.htm (last visited Dec. 1, 2013).

called “rhythm chord changes” (i.e., I maj7-VI min7-IImin7-V7)⁵⁰ It is almost a rite of passage for jazz students to learn how to improvise over these chords. Jazz icon saxophonist Sonny Rollins and many others have even taken these chords and composed new melodies for them.⁵¹

One legal writer has noted that harmonic progressions like this receive a “thin copyright,”⁵² in the sense that no court has explicitly rendered a decision on their reuse.⁵³ He argues that “copyright law . . . implicitly acknowledges that a substantial part of the underlying composition (the harmonic progression) is simply an idea or springboard for expression”⁵⁴ While it can be risky to generalize what’s on the mind of judges who have never rendered a decision on an issue, the silence by the courts in the face of a 100-year plus practice in jazz makes the writer’s logic compelling. Thus, it is fair to conclude that while new melodies composed over standard chord progressions are good candidates for copyright protection, the original chords may well be relegated to the public domain.

3. *How Rhythm Is Treated in Copyright Law*

There is also a tendency in the courts to treat certain common rhythmic patterns like *scènes à faire*, especially well-known styles like waltzes, pop, rock, funk, jazz, or R&B.⁵⁵ This is because historically, at least in U.S.-western musical context, a drummer’s chief role in a band was to maintain a steady beat so that the other musicians could stay on track in a coordinated and timely manner.⁵⁶ Thus, you could have two songs with the same underlying rhythm—a waltz, let’s say, in 3/4 time or a jazz swing piece with a “two-bar, one-measure 4/4 “swing” pattern, with the hi-hat on top line, and snare drum on middle line, bass drum on bottom line.”⁵⁷ While the two songs could have different melodies and lyrics, neither would infringe on the

50. Peter Thomas, *I’ve Got Rhythm Chord Changes*, TAMING THE SAXOPHONE, <http://tamingthesaxophone.com/jazz-i-got-rhythm> (last visited Nov. 30, 2013).

51. Bob Gillis, *Oleo: Not Just A Reharmonization*, BOB GILLIS: MUSICIAN (Dec. 13, 2012), <http://www.bobgillis.wordpress.com/2012/12/13/oleo-not-just-a-reharmonization>.

52. Note, *supra* note 46, at 197 (citing MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][2][a] 13–70 (2004)).

53. *Id.* (citing ROSS RUSSELL, *THE SOUND* (1962), reprinted in ANDREW CLARK, RIFFS & CHORUSES: A NEW JAZZ ANTHOLOGY 126 (2001)).

54. *Id.* at 1948–50.

55. David Bloch, “Give the Drummer Some!” *On the Need for Enhanced Protection of Drum Beats*, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 191 (1997).

56. *Id.*

57. *Id.* (citing CRAIG LAURITSEN, *PROGRESSIVE DRUM METHOD* 67 (1994)).

other because the underlying beat would not be considered creative or original.

This approach to rhythmic analysis is shortsighted and particularly unfair to the early black pioneers in American music. Delinking rhythm from its associated harmony, especially in connection with most of black American music, is akin to trying to view a Picasso painting solely based on its color scheme. Without being able to see the figures and shapes Picasso's colors were intended to fill, all you have left is a one-dimensional version of his work. The same would be true for a piece of jazz music or a popular R&B tune.

Especially in its early stages of development in the United States, black rhythm was highly innovative, in contrast to European-influenced rhythms used at the time. Well-known composer and musicologist Gunther Schuller has said:

Since rhythm and inflection are the elements that most obviously distinguish jazz from the rest of Western music... its uniqueness derives from two primary sources: a quality jazz musicians call "swing," and the consistent "democratization" of rhythmic values. Both characteristics derive exclusively from African musical antecedents.⁵⁸

With respect to the concept of "swing" and its relationship to rhythm in jazz, Schuller explains that swing has two characteristics that make it different from European-influenced classical music:

(1) a specific type of accentuation and inflection with which notes are played or sung, and (2) the continuity—the forward-propelling directionality—with which individual notes are linked together.... These two swing qualities are present in all great jazz.... [Whereas] in the performance of "classical music,"... there is a hierarchy of elemental relationships in which pitch is considered more important than rhythm. A "classical" musician... is frequently asked to... play a given

58. GUNTHER SCHULLER, *EARLY JAZZ: ITS ROOTS AND MUSICAL DEVELOPMENT* 6 (1968) (citing HERBERT PEPPER, *ANTHOLOGIE DE LA VIE AFRICAINE* (Ducretet-Thomson 1958) and VARIOUS ARTISTS, *HISTORY OF LE CLASSIC JAZZ* (Riverside Records 1994)).

series of notes mindful only of vertical accuracy, while paying no particular attention to its propulsive flow.⁵⁹

Thus, since so much of what makes black American music compelling is this propulsive flow of rhythm, ignoring rhythm's significance unfairly marginalizes the role that early black American music made to the development of American popular music and jazz. When applied to today's popular black music, this same limited notion about the role of rhythm unfairly hurts black songwriters, especially people like Marvin Gaye, who helped created the R&B/soul sound that we take for granted today.

4. *How Melody Is Treated in Copyright Law*

While there may be some instances where a melody is not given protected status,⁶⁰ melodies have generally been given the greatest consideration in infringement cases.⁶¹ As early as the 1950s, one judge explained that "it is in the melody of the composition . . . that originality must be found. It is the arrangement or succession of musical tones, which are the fingerprints of the composition, and establish its identity."⁶²

Again, as is the case with traditional judicial interpretations of harmony and rhythm, this approach to melody displays a very simplistic understanding for how music works. As anyone with extensive experience analyzing and composing music knows, "an artist's musical expression is inextricably linked to the mechanics of the music. The sequencing of notes and chords, the harmony,

59. *Id.* at 7.

60. For example, the court in the *Bright Tunes Music v. Harrisongs* case said the core aspects of the melody in *He's So Fine* were not original in and of themselves. They consisted of:

Four repetitions of a very short basic musical phrase, "sol-mi-re," (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B). *While neither motif is novel*, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern.

420 F. Supp. 177, 178 (S.D.N.Y. 1976) (emphasis added).

61. Jeffrey Cadwell, *Expert Testimony, Scènes à Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 166–67 n.230 (2005) (describing *Hein v. Harris*, 175 F. 875, 876 (S.D.N.Y. 1910), in which the judge decided to exclusively compare melody lines in the two songs in question, completely disregarding their differing respective harmonic structures).

62. *Id.* at 167 n.232 (citing *N. Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952)).

melody, beat, tempo, composition, and lyrics all work together to create a musical expression.”⁶³ Courts should therefore be on guard when they extricate so-called common, generic musical elements (i.e., harmony or rhythm) in a song from its melody. With respect to literary works:

[I]n distinguishing between themes, facts, and *scènes à faire* on the one hand, and copyrightable expression on the other, courts may lose sight of the forest for the trees. By factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author’s expression.⁶⁴

The same can be said for music.

Unfortunately, the standard for determining whether one song infringes on another is usually “whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression.”⁶⁵ This is accomplished when a judge puts herself “in the position of the average person who would listen to the two records.”⁶⁶ This might explain why so much of the legal discussion about harmony and rhythm in copyright cases fails to take into account what is actually happening in the music. To determine this, a music expert would have to be used instead of a judge with less sophisticated musical eyes and ears.

If the judge in the *Thicke* case applies the above discussed legal standards to harmony, rhythm, and melody, she will probably subtract the rhythmic and harmonic footprint of “Gotta Give It Up” before engaging in a substantial similarity analysis, on the grounds that the footprint is a kind of soul/R&B *scène à faire*. In other words, the judge will probably say that the rhythm and harmony set the tone or vibe for the actual expression of the idea for the song via its melody and lyrics.

63. Valeria M. Castanaro, “*It’s the Same Old Song*”: *The Failure of the Originality Requirement in Musical Copyright*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1271, 1282 (2008).

64. *Hoehling v. Universal City Studios*, 618 F.2d 972, 979–80 (2d Cir. 1976).

65. See also *Allen v. Destiny’s Child*, 2009 WL 2178676, at *22 (N.D. Ill. July 21, 2009) (citing *Incredible Techs, Inc. v. Virtual Techs, Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005)).

66. John R. Zoesch, *Discontented Blues: Jazz Arrangements and the Case for Improvements in Copyright Law*, 55 CATH. U. L. REV. 867, 891 (2006) (citing *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 912 (S.D. Cal. 1950)).

Thicke and Williams have already given some indication that they would make this very argument in the case. Their motion for declaratory judgment states that “the basis of the Gaye defendants’ claims is that ‘Blurred Lines’ and ‘Got To Give It Up’ ‘feel’ or ‘sound’ the same. Being reminiscent of a ‘sound’ is not copyright infringement,”⁶⁷ because “commonplace musical elements”⁶⁸ are used.

Gaye’s estate, on the other hand, will likely argue that it is impossible to separate his song’s overall “vibe” or “feel” from its core elements and that they are so intertwined as to be inseparable. This is similar to the point made by one of the judges in *Swirsky v. Carey*,⁶⁹ who stated that, “to disregard chord progression, key, tempo, rhythm, and genre is to ignore the fact that a substantial similarity can be found in a combination of elements, even if those elements are individually unprotected.”⁷⁰

D. Conclusions About Blurred Lines and Copyright Law

So what is left after we subtract the rhythmic and harmonic structure from “Gotta Give It Up”? What is left is the melody. Upon transcribing the two songs, it appears that the melodies in each are different in that the melody in Gaye’s song goes back and forth between a minor key (based on a minor scale) and major key (based on a major scale) producing a blues like effect fairly typical of R&B music of Gaye’s era. The Thicke/Williams song predominantly uses a major scale.

It might be helpful to explain how this might sound. Imagine the song, “Three Blind Mice,” which use the pitches in a major scale to make up the opening part of its melody, as follows:

Figure A



67. Complaint, *supra* note 13, at 2.

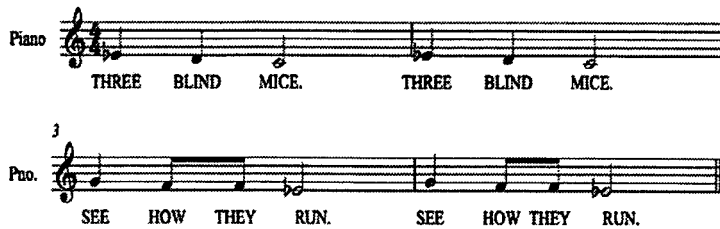
68. *Id.*

69. 376 F.3d 841, 848 (9th Cir. 2004).

70. Cadwell, *supra* note 61, at 166–67 n.230 (citing *Swirsky*, 376 F.3d at 848).

Then imagine “Three Blind Mice” now written with pitches from a minor scale, as follows:

Figure B



Note that all that has occurred in Fig. B is a simple change in one note (the “E” to an “E flat” for the words, “three” and “run”). The second version is still based on the essential aspects of the original song.

As such, the new minor scale and sadder-sounding version of “Three Blind Mice” would be considered a derivative work under the Copyright Act. Section 101 of the Act defines a derivative work as “a work based upon one or more preexisting works, such as a translation, [and musical arrangement],”⁷¹ among other things. A musical work’s original author retains exclusive rights to all derivative works created in connection with it under Section 103(a) of the Copyright Act.⁷² If, however, the new work so transforms the original work that it essentially turned it into a completely new creative artifact, then the new work might be granted its own copyright separate and distinct from the original work.⁷³

For instance, if a new work employs “unusual vocal treatment, additional lyrics of consequence, unusual altered harmonies, novel sequential uses of themes—something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed,”⁷⁴ then it might be considered a transformative work. In one case, a judge ruled that when the second songwriter “added an introduction, handclapping, choral responses, and some filler music [to a copyrighted work, doing so] . . . did not rise to the requisite level of creativity to warrant protection.”⁷⁵

71. 17 U.S.C. § 101 (2012).

72. 17 U.S.C. § 103(a) (2012).

73. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

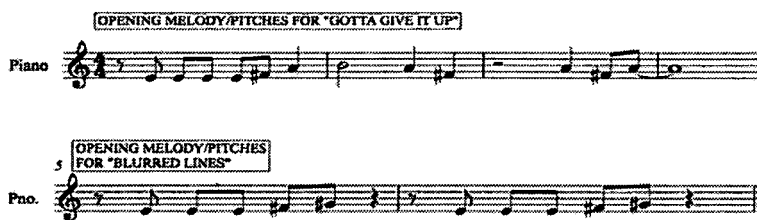
74. Zoesch, *supra* note 66, at 881 (citations omitted).

75. *Id.* at 913.

With respect to “Blurred Lines,” Williams has said “anybody that plays music and reads music, just simply go to the piano and play the two. One’s minor and one’s major. And not even in the same key.”⁷⁶ This comment actually helps Gaye’s estate, not Williams, since all Williams did was change the original song from a minor to a major key, the change would make the new work a derivative work for which he would be required to get permission to sell. Perhaps at the time Williams made the statement, he had not yet had the advice of a good intellectual property attorney. Had he had that advice, he probably would have been told that his best argument would be that the melodies in “Blurred Lines” and “Gotta Give It Up” were not substantially similar.

Here is a chart comparing the melody for “Gotta Give It Up” to “Blurred Lines” based on my own transcriptions after listening to both:

Figure C



Except for the same brief opening use of the notes: E played as three adjacent eighth notes, followed by an F sharp eighth note, the two melodies are not the same. After that, each melody takes off in different directions.

In light of the discussion above, a court would probably decide in favor of Thicke and Williams. After subtracting the harmony and rhythmic structure from “Gotta Give It Up” on the grounds that they are *scènes à faire*, the court would conclude that the two melodies are not substantially similar. As I said in my introduction, however, this does not mean that such a result would be fair or equitable, especially if one decides that “Blurred Lines” is a form of cultural appropriation. I will take up this issue in Part III.

76. Murrow, *supra* note 39.

III. Does “Blurred Lines” Culturally Appropriate Black Soul Music?

The incredible power and impact that the black creative arts have had on America is well documented. As early as the 1920s, James Weldon Johnson, one of the leading figures in the Harlem Renaissance, said: “[T]he final measure of the greatness of all peoples is the amount and standard of the literature and art they have produced ‘Through his artistic efforts the Negro is smashing the race barriers faster than he has ever done through any other method.’”⁷⁷ Carla Kaplan, author of *Miss Anne in Harlem: The White Women of the Black Renaissance*, has said, “Given those stakes, it should not be surprising that Harlem’s black writers watched with dismay as white writers, including Gerturde Stein, . . . Carl Van Vechten, . . . Eugene O’Neill, . . . and Fanny Hurst became more successful for depicting black life than they were.”⁷⁸ Harlem Renaissance icon, Zora Neale Hurston, put it bluntly: “It makes me sick to see how these . . . white folks are grabbing our stuff and ruining it. [M]y only consolation being that they never do it right and so there is still a chance for us.”⁷⁹

This phenomenon has even made its way into contemporary fiction in the Alice Walker story, “1955,” about an aging black blues singer (“Little Mama”) who once wrote songs for blues pioneer, Bessie Smith.⁸⁰ Describing her life on the road as neither easy or lucrative, Little Mama says: “me singing in first one little low-life jook after another, making ten dollars a night for myself if I was lucky, and sometimes bringin’ home nothing but my life.”⁸¹ In the story, a young, southern white singer, “Traynor,” most probably modeled on white rock and roll singer, Elvis Presley, wants to perform and record one of Little Mama’s songs. His agents tell her: “Traynor here just loves your songs. . . . The boy learned to sing and dance livin’ round you people out in the country. Practically cut his teeth on you.”⁸²

After signing away her rights to Traynor’s agents, Little Mama gets to see him perform her song. “Well, Lord have mercy If

77. CARLA KAPLAN, *MISS ANNE IN HARLEM: THE WHITE WOMEN OF THE BLACK RENAISSANCE* 19–20 (2013) (quoting JAMES WELDON JOHNSON, *Preface to THE BOOK OF AMERICAN NEGRO POETRY* 9 (Rev. ed., New York: Harcourt Brace Jovanich 1931).

78. *Id.* at 23 (quoting CARLA KAPLAN, *Zora Neale Hurston to Langston Hughes, Sept. 20, 1928*, in *ZORA NEALE HURSTON: A LIFE IN LETTERS* 126 (Doubleday 2002)).

79. *Id.*

80. ALICE WALKER, *1955*, in *YOU CAN’T KEEP A GOOD WOMAN DOWN* (1981).

81. *Id.* at 6.

82. *Id.* at 4.

I'da closed my eyes, it could have been me Traynor singing my song, and all the little white girls just eating it up. I never had so many ponytails switched across my line of vision in my life. They was so *proud*,"⁸³ she says. Traynor goes on to become extremely popular and successful in the mainstream white world. But when he takes Little Mama on the *Johnny Carson* late night show to honor and introduce her influence on him, the crowd only "claps politely,"⁸⁴ when she sings, saving their "matronly squeals"⁸⁵ for Traynor, even though "he sings it just the way he always did. My voice, my tone, my inflection, everything,"⁸⁶ Little Mama observes.

Truth often being the same as fiction, the story of Little Mama is eerily similar to the true story of the black singer/songwriter, Otis Blackwell. Elvis Presley sang many of the hits Blackwell composed, and modeled his singing style on Blackwell's performances on the demo records Blackwell sent to Elvis for consideration.⁸⁷ The two men never met.⁸⁸

Early American folklorists such as Alan Lomax, now famous for field recording some of the country's first recognized black blues artists including Leadbelly, engaged in even worse forms of exploitation. Some of those recordings were of black prisoners forced to perform for Lomax by white prison guards.⁸⁹ Lomax later refused to let Leadbelly enjoy income from the copyrights to the music in these recordings, arguing that the music was simply part of a larger American "folk music" tradition.

83. *Id.* at 7.

84. *Id.* at 18.

85. *Id.* at 19.

86. WALKER, *supra* note 80, at 18.

87. GARY GIDDENS, *Just How Much Did Elvis Learn from Otis Blackwell*, in *RIDING ON A BLUE NOTE: JAZZ AND AMERICAN POP* 31–32 (1981) (quoting songwriter Doc Pomus, who worked with Blackwell and Elvis in the early days of Elvis's career):

(Elvis did not create those sounds. He managed to get his name on songs he had nothing to do with writing . . . his singing was significantly influenced by Otis. If you compare the demos, you will find incredible how Elvis copied them, especially the sound of Otis's voice.).

88. *Id.* at 34–35.

89. Olufunmilayo B. Arewa, *Blues Lives: The Promises and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573, 580 (2010) (citing Benjamin Filene, "Our Singing Country": John Lomax, Alan Lomax, Leadbelly and the Construction of an American Past, 43 AM. Q. 619 (1991) (discussing an episode in which the Lomaxes, who operated closely with prison officials, attempted to get a recording from a prisoner brought to the room at gunpoint)).

Legal scholar, Olufunmilayo B. Arewa, has said: “the tendency to see blues music as a primitive form of collective folk production reflected widespread stereotypes about African Americans and was part of a conceptual framework of later borrowers that facilitated the free borrowing of such music, often without attribution, let alone compensation.”⁹⁰ Further, “later borrowers were . . . not the only ones to profit from early blues artists. Both folklorists and record industry participants in some instances claimed copyrights in the music that they ‘discovered.’”⁹¹ One cannot help but notice here that Thicke and Williams’s characterization of Gaye’s music as part of a larger unprotected “style” of music is similar to the arguments made by Lomax that blues was folk music and thus not, in and of itself, protected under copyright law.

Given this continued history of whites benefitting more monetarily from their use of black art forms than the forms’ originators,⁹² it is not surprisingly that the topic of cultural appropriation invokes heightened responses of anger and confusion on all sides even today. The topic touches on the very thorny topics of race, racism, and white privilege in the United States—topics that even in these times are hard for many people to grapple with in mixed race company.⁹³

Two distinct viewpoints emerge from this controversy today. In the first camp are those spiritually aligned with people like Zora Neale Hurston. They believe that the use by people from the majority culture (in the case of the United States, that would be whites) of certain cultural practices adopted by minority groups is problematic.⁹⁴ Motives for the use are assumed to be suspect and

90. Arewa, *supra* note 89, at 582.

91. *Id.* (citing Ulrik Volgsten & Yngve Åkerberg, *Copyright, Music, and Morals: Artistic Expression and the Public Sphere*, in MUSIC AND MANIPULATION: ON THE SOCIAL USES AND SOCIAL CONTROL OF MUSIC 336–37 (2006) (describing folk collector Alan Lomax’s copyright claims with respect to Leadbelly); David Marsh, *Mr. Big Stuff: Alan Lomax: Great White Hunter, or Thief, Plagiarist, and Bigot*, COUNTERPUNCH (July 21, 2002), <http://www.counterpunch.org/marsh0721.html> (criticizing Alan Lomax’s refusal to surrender income from copyright claims relating to Leadbelly’s music).

92. GARY GIDDENS, *Whiteness of the Whale*, in RIDING ON A BLUE NOTE: JAZZ AND AMERICAN POP, *supra* note 87, at 255 (describing how in the 1950s “white musicians could accede to the studios, those lucrative Muzak factories into which pale faced dilettante jazz artists frequently passed . . .”).

93. *What Is Cultural Appropriation*, THE ANGRY BLACK WOMAN: RACE, POLITICS, SEXUALITY, GENDER, ANGER (Jan. 15, 2009), <http://theangryblackwoman.com/2009/01/15/what-is-cultural-appropriation>.

94. *Cultural Appropriation and Misappropriation*, RELIGIONTHEOLOGY.ORG, available at http://www.religionandtheology.org/cultural_appropriation.html#Cultural_Misappropriation (last visited Mar. 19, 2014) (citations omitted).

exploitative. People in the second camp tend to be members of the majority culture who view that use as simply the positive product of a harmonious cultural “melting pot” of ideas, sights and sounds. A journalist reviewing a new piece of theater by a white director inspired by ancient Japanese theater traditions, typifies the latter view. She says: “Julie Taymor built on techniques she learned in Indonesia, and Anne Bogart passes along Noh’s dramatic vocabulary whenever she teaches the Suzuki method. Whether you condemn it as cultural appropriation or praise it as cross-pollination, the result seems to be better art.”⁹⁵

Jason Shelton of the Unitarian Church, in response to debates in his denomination about the use of nonwhite spiritual rituals and traditions, such as Kwanza, in a mostly white Unitarian context, elaborates on this:

I would like to begin by questioning the idea that . . . musical traditions of any culture can ever really be “owned” by any person or group . . . there are moments when peoples express their particular genius in a truly unique and unaffected manner, but these moments are rare indeed. . . . [O]ur tendency to guard those traditions with references to cultural appropriation or even accusations of racism (or at the very least insensitivity) cut off the possibility of dialogue and real learning that can come from the sharing and exchange of ideas and traditions which is possible in our world today as never before.⁹⁶

It seems, however, that “melting pot” adherents such as Shelton have to sanitize history to make it more congenial to their point of view. He goes on to say:

Yes, racism is a part of jazz history . . . But there has also been an underlying sense among many jazz musicians—especially bandleaders—that the important thing was not the color of the musician’s skin, but whether or not he or she could *play*. In jazz, if you can play, you’ll get the gig (until

95. Helen Shaw, *A Major Achievement*, THE N.Y. SUN (Jan. 17, 2006), <http://www.ny.sun.com/arts/major-achievement/25979>.

96. Jason Shelton, *A Perspective on Music and Cultural Misappropriation*, RELIGIONTHEOLOGY, www.religionandtheology.org/cultural_appropriation.html (last visited Mar. 19, 2014) (citations omitted).

someone comes along who does it better than you—so you'd better practice!).⁹⁷

Shelton, however, says nothing about the early days of jazz in the United States, during which racist attitudes caused most whites to favor white jazz bands over black jazz bands.⁹⁸ Or the way in which racism in the broadcast industry shaped who got exposure (and its ensuing financial rewards) and who did not. Radio:

[W]as distinguished by the virtual exclusion of African-American broadcasters and, second, by a program environment in which African-American musicians . . . were vastly outnumbered by white musicians performing facsimiles of "blackness" in the form of popular syncopated dance music or white entertainers in blackface minstrel routines . . .⁹⁹

Even when black artists were allowed to play for white audiences in the South, their own people were either not allowed to attend the performances or were forced to sit in segregated Jim Crow sections.¹⁰⁰ The artists were further burdened by the fact that, while on the road, they had to find black families to host them because they were not allowed to stay in white hotels.¹⁰¹

Shelton therefore downplays the *prevalent*, not simply occasional, level of racial discrimination that black jazz artists faced in the genre's early days. When history is overlooked in this manner, it only makes people in the other camp more frustrated, since the unequal power relations that produced the situation enabling whites to get more money, more jobs, and better entertainment business deals than blacks is ignored. One commentator observes:

A Japanese teen wearing a t-shirt emblazoned with the logo of a big American company is not the same as Madonna sporting a bindi as part of her latest reinvention. The difference is

97. *Id.*

98. Lynee Seago, *From Potent to Popular: The Effects of Racism on Chicago Jazz 1920–1930*, in 1 CONSTRUCTING THE PAST 43, 44 (2000), available at www.digitalcommons.iwu.edu/constr/ucting/vol11/iss1/6.

99. Derek W. Valliant, *Sound of Whiteness: Local Radio, Racial Formation, and Public Culture in Chicago, 1921–1935*, 54 AM. Q. 1, 30 (2002).

100. FRANK TIRRO, JAZZ: A HISTORY 255, 443 (2d ed., 1977) (citing THOMAS JOSEPH HENNESSEY, FROM JAZZ TO SWING: BLACK MUSICIANS AND THEIR MUSIC, 1917–35 (Detroit: Wayne State Univ. Press, 1994)).

101. *Id.*

history and power. Colonization has made Western Anglo culture supreme—powerful and coveted Ignorance of culture that is a burden to Asians, African and indigenous peoples, is unknown to most European descendants or at least lacks the same negative impact.¹⁰²

So where does the “Blurred Lines” dispute fall within this spectrum of analyses? The song, given who ended up singing it and getting the greater public recognition for it—the white singer, Thicke—is definitely a form of cultural appropriation, albeit a “lite” version. I say “lite” because the song’s co-writer, Williams, who is black, also benefits financially (I am assuming 50–50) from its sales.

Nevertheless, I am not completely ready to let go of the term “cultural appropriation” because the dramatic economic success of the song is definitely tied to the fact that the primary singer is white, much in the same way that the white singer in Alice Walker’s story, “55,” garners those matronly squeals, whereas the song’s originator only gets polite applause.

Macklemore, another white artist who has had Billboard chart topping hits with such hip hop songs like “White Privilege,” admits to this situation:

When I take a step to the mic is hip-hop closer to the end?
 ‘Cause when I go to shows the majority have white skin
 And white rappers’ albums really get the most spins
 Claimed a culture that wasn’t mine, the way of the American
 hip hop is gentrified and where will all the people live
 Being pushed farther away because of what white people did,
 now.¹⁰³

IV. Final Conclusions

Readers should not infer from this article that I think creative artists should stop trying to absorb and incorporate styles and arts forms from other cultures. If that were the case, much of the world’s great art and music would not have been created. But it is equally important to be *cognizant* of the cultures we are influenced by in our creative process and to *honor* those cultures with overt forms of

102. Tami, *Cultural Appropriation, Homage or Insult*, RACIALICIOUS—THE INTERSECTION OF RACE AND POP CULTURE (Sept. 18, 2008), <http://www.racialicious.com/2008/09/18/cultural-appropriation-homage-or-insult>.

103. Lang, *supra* note 24, at 106.

public recognition, and perhaps even compensation, when possible. Innovation in art is as good for the artist as it is for the culture in general, as long as the artist is mindful of and recognizes the traditions from whence their inspiration came, especially when the source of the inspiration is innovative in its own right.

Crafting a legal remedy for cultural appropriation-lite, however, will not be easy, especially when it comes to compensating individuals from nonmajority cultures in cases where the law does not require it. Outside of copyright law, there are some potential alternative compensatory remedies that can be utilized in cases where there is contractual fraud in inducing an artist to sign with a producer or record company,¹⁰⁴ or even undue influence¹⁰⁵ or duress¹⁰⁶ where artists like the prisoners in the Alan Lomax situation are forced to enter into deals involuntarily. Some courts might even overturn a contract simply based on the fact that its terms are extremely unfair.¹⁰⁷

For the cases of questionable behavior in contracts entered into long ago, however, the statute of limitations has long ago expired.¹⁰⁸ That is probably why scholar K.J. Greene has proposed that in contexts involving the earlier, more extreme examples of white exploitation of black artists, a system of reparations be put into place to compensate the heirs of those black artists.¹⁰⁹ However, as I have indicated here, the current situation is not as severe as these other instances.

Marvin Gaye's heirs may simply have to settle for an apology in this case, which would probably have irked him if he were still alive.

104. KENNETH CLARKSON, ROGER LEROY MILLER, & FRANK B. CROSS, BUSINESS LAW: TEXT AND CASES 264 (13th ed., 2014):

Typically, fraud consists of the following elements:

1. A representation of a material fact as occurred.
2. There exists an intent to deceive.
3. The innocent party has justifiably relied on the misrepresentation.
4. For damages, the innocent party must have been injured.

105. *Id.* at 268 (“The essential feature of undue influence is that the party being taken advantage of does not, in reality, exercise free will in entering into a contract.”).

106. *Id.* at 269 (providing that duress is “forcing a party to do something, including entering into a contract, through fear created by threats”).

107. *Id.* at 375 (providing that unconscionability takes place when there is a “purported lack of voluntariness due to disparity in bargaining power between the two parties”).

108. *Statute of Limitations*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, www.courts.ca.gov/9618.htm (last visited Dec. 1, 2013).

109. *See generally*, Greene, *supra* note 20.

But as someone who regularly used the frustrations he encountered culturally and in his personal life as fuel for his creative imagination, he would probably also do something about it artistically. Once, after a divorce, Gaye produced the album, *Here, My Dear*—a bitter critique of marriage—in order to use the proceeds to pay for the settlement assessed against him.¹¹⁰ And as most people know, “What’s Going On” became the anthem for a whole generation of Americans who were no longer willing to tolerate racial segregation and oppression and the United States.¹¹¹ The Thicke suit would have probably inspired Gaye to craft a new song protesting the outcome. I am sure, like everything else he did, it would be a time tested hit and cultural phenomenon, lasting much longer in the public’s consciousness than the popularity of “Blurred Lines.”

110. Peter Lester, *In LA, Other Marvin Case, It's Gaye vs. Anna Gordy*, PEOPLE (Apr. 9, 1979), <http://www.people.com/people/archive/article/0%2C%2C20073368%2C00.html>.

111. The song is such a cultural and historical phenomenon that even the Kennedy Center has a special web site devoted to it. See generally Home Page, WHAT'S GOING ON, <http://whatsgoingonnow.org/>.
